

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DENNIS DALE HAYES,

Charging Party,

v.

SEIU-UNITED HEALTHCARE WORKERS
WEST LOCAL 2005,

Respondent.

Case No. LA-CO-97-M

PERB Decision No. 2168-M

February 25, 2011

Appearance: Ronald G. Johnson, Representative, for Dennis Dale Hayes.

Before Dowdin Calvillo, Chair; McKeag and Miner, Members.

DECISION

MINER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Dennis Dale Hayes (Hayes) from a Board agent's dismissal (attached) of an unfair practice charge. The charge, as amended, alleged that the SEIU-United Healthcare Workers West Local 2005 violated numerous sections of the Meyers-Milias-Brown Act (MMBA or Act)¹ by, *inter alia*, violating its duty of fair representation toward Hayes in connection with one or more grievances filed by him. The Board agent determined that the charge failed to establish a prima facie violation of the Act, and therefore dismissed the charge.

The Board has reviewed the dismissal and the record in light of Hayes's appeal and the relevant law. Based on this review, the Board finds the Board agent's warning and dismissal

¹ The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

letters to be well-reasoned and a correct statement of the law, and therefore adopts them as the decision of the Board itself, subject to the discussion below.

DISCUSSION

An unfair practice charge must include a clear and concise statement of the facts and conduct by the respondent alleged to constitute an unfair practice under the MMBA. (PERB Reg. 32615(a)(5);² *State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S; *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient, and the charging party bears the burden of alleging all material facts necessary to state a prima facie case. (*Los Angeles Unified School District* (1984) PERB Decision No. 473.) In processing a charge, the Board agent has a duty to:

- (1) Assist the charging party to state in proper form the information required by section 32615;
- (2) Answer procedural questions of each party regarding the processing of the case;
- (3) Facilitate communication and the exchange of information between the parties;
- (4) Make inquiries and review the charge and any accompanying materials to determine whether an unfair practice has been, or is being, committed, and determine whether the charge is subject to deferral to arbitration, or to dismissal for lack of timeliness.
- (5) Dismiss the charge or any part thereof as provided in Section 32630 if it is determined that the charge or the evidence is insufficient to establish a prima facie case; or if it is determined that a complaint may not be issued in light of Government Code Sections 3514.5, 3541.5, 3563.2, 71639.1(c) or 71825(c), or Public Utilities Code Section 99561.2; or if it is determined that a charge filed pursuant to Government Code section 3509(b) is

² PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

based upon conduct occurring more than six months prior to the filing of the charge.

(6) Place the charge in abeyance if the dispute arises under MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act and is subject to final and binding arbitration pursuant to a collective bargaining agreement, and dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act, as provided in section 32661.

(7) Issue a complaint pursuant to Section 32640.

(PERB Reg. 32620.)

While the Board agent's duties include assisting the charging party in stating the proper form of the charge, making inquiries and reviewing the charge and any accompanying materials, the duty remains with the charging party to provide a clear and concise statement of the facts. (*Regents of the University of California* (2004) PERB Decision No. 1585-H; *Regents of the University of California* (2004) PERB Decision No. 1592-H.)

In this case, the Board agent communicated on numerous occasions with Hayes in an attempt to assist him in filing a charge alleging specific facts that, if proven, would constitute an unfair practice charge. In addition to speaking with him directly, the Board agent allowed Hayes to amend his charge six times.³ On October 26, 2009, the Board agent issued a warning letter advising Hayes of the deficiencies of the charge. On appeal, Hayes points to no specific factual allegations in the charging documents that would establish a prima facie violation of the MMBA. Instead, he simply expresses his disagreement with the Board agent's analysis. The purpose of the Board agent's review is to determine if the charge states sufficient facts

³ Subsequent to the filing of the initial charge, PERB's file contains correspondence from Hayes or his representative dated May 21, 2009, June 5, 2009, June 15, 2009, June 30, 2009, July 2, 2009 and November 21, 2009.

that, if proven, would constitute an unfair practice. It is incumbent upon the charging party to provide such facts to the Board agent. (*Regents of the University of California, supra*, PERB Decision No. 1585-H.) The remainder of the appeal consists of brief, conclusory responses to the dismissal and warning letters but fails to identify any specific factual allegations in the charge that would support finding a prima facie case. Because Hayes failed to provide specific facts to support his charge, it was properly dismissed by the Board agent.

ORDER

The unfair practice charge in Case No. LA-CO-97-M is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2809
Fax: (818) 551-2820



January 7, 2010

Ronald Glen Johnson

Re: *Dennis Dale Hayes v. SEIU-United Healthcare Workers West Local 2005*
Unfair Practice Charge No. LA-CO-97-M
DISMISSAL LETTER

Dear Mr. Johnson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 7, 2009,¹ and was amended on May 21, June 8, 17, July 6, 8, and November 21, 2009. In the original charge and in the first five amended charges, Dennis Dale Hayes (Mr. Hayes or Charging Party) alleged that the SEIU-United Healthcare Workers West Local 2005 (Respondent or Local 2005) violated sections "3500-inclusive; 3500.5; 3501(A), (1), (2), (B), (C), (D), (E); 3504; 3504.5(A); 3505; 3507-(5), (6), [and] (7)" of the Meyers-Milias-Brown Act (MMBA or Act).² In the November 21 amended charge, Charging Party alleges that Respondent also violated sections 3501(a) through (i), 3501(b), (d), and (e), 3506, 3507(a) (5), (6), and (7) of the MMBA.

Charging Party was informed in the attached Warning Letter dated October 29, 2009, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in the Warning Letter, Charging Party should amend the charge. Charging Party was further advised that, unless he amended the charge to state a prima facie case or withdrew it prior to November 9, 2009, the charge would be dismissed.

In a facsimile dated November 14, 2009, Charging Party's representative, Ronald Glen Johnson, notified the undersigned that he did not receive the October 29 Warning Letter until November 4, 2009, and thus he could not file an amended charge on Charging Party's behalf prior to the November 9, 2009 deadline. On November 16, 2009, the undersigned granted

¹ On May 7, 2009, Mr. Hayes also filed an unfair practice charge against Service Employees International Union (LA-CO-96-M) and another against Antelope Valley Hospital District (LA-CE-534-M).

² The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB'S Regulations may be found at www.perb.ca.gov.

Charging Party's request for an extension of time to file an amended charge. PERB received Charging Party's sixth³ amended charge on November 21, 2009.

The November 21 amended charge provides in relevant part:

1. Withdraw alleged violations to MMBA sections 3500, 3500.5, 3501A-(2), 3501(C), 3504, 3504.5(A), and 3505.

2. The following MMBA section violations we charge:

3501A-(1), 3501-(B), 3501-(D), 3501-(E), 3506, 3507-(5), 3507-(6), and 3507-(7).

3501A-(1): Charging [P]arty was in fact an employee of a Special District for many years.

3501-(B): To the point, Antelope Valley Hospital District is a Special District.

3501-(D): Charging [P]arty maintains he was a public employee.

3501-(E): Charging [P]arty was not afforded a mediator at anytime for either grievance.

3506 Charging [P]arty was protected under this section of MMBA as an employee of a Special District.

3507A-(5): Charging [P]arty was among the first to promote the Union. Subsequently, [he] was punished. Specifically, with respect to scheduling, wages, hours, and other conditions of employment.

3507A-(6): Charging [P]arty states that access to his hospital representatives and Union representatives for information concerning scheduling, wages, hours, and seniority was not afforded [to] him by either at any time

³ Charging Party refers to the November 21 amended charge as the fourth amended charge.

prior to filing [the above-titled charge] with PERB.

3507A-(7): An employment position was appointed arbitrarily instead of collectively.

Mr. McKee, I assure you the following statements are based on evidence of the conduct which constitutes unfair labor practices towards Dennis D Hayes under the MMBA guidelines/statutes.

- 3501A-(1): No [R]espondent accepted responsibility for grievances or remedies filed from May 2007 through May 2009 from Board of Directors to immediate superiors Maria Kelly, Director of Radiology and Jill Bunch, Ultrasound Section Supervisor at the time, including Vladimir Dominguez, Union Representative or any of his people.
- 3501-(B)[:]: [Antelope Valley Health District] would not disclose responsibilities under the articles of a Collective Bargaining Agreement from May 2007 through May 2009.
- 3501-(D)[:]: Human Resources management John Sullivan, Vice President; Gregg Goins, Director; Staci Johnson, Employee Relations Officer; and Rick Rowe, Vice President Clinical Support Services never released information to clarify my status as a Special District employee or as a member of the Collective Bargaining Agreement from May 2007 through May 2009 when [the above-titled charge] was filed with PERB in May 2009.
- 3501-(E): Sue Vradenberg, Union Steward; Leo Ward, Union Steward; Alonso Salinas, Union Steward; Rick Rowe, Vice President Clinical Support Services; Staci Johnson, Employee Relations Officer; Dwayne Roberts, Chief Union Steward, Vladimir Dominguez, Union Representative; John Sullivan, Vice President Human Resources; Gregg Goins, Director [of] Human Resources; all could have and should have represented Charging [P]arty comprehensively instead of provable negligence in their duty from May 2007 through May 2009.

- 3506 No employees of [Antelope Valley Hospital District] or [Respondent] treated Charging [P]arty's case objectively from May 2007 through May 2009 when complaint of violations of MMBA guidelines/statutes was filed with PERB. Names not withheld but too numerous to list here.
- 3507A-(5) Directly after [Charging Party's] promotion of the [Respondent] beginning May 2007, John Sullivan, Vice President Human Resources; Rick Rowe, Vice President Clinical Support Services; Maria Kelly, Director Radiology Services; and Jill Bunch, Ultrasound Section Supervisor instigated a document called the Last Chance Agreement (LCA) at which time I was threatened with termination should I choose not to sign. I immediately provided a response to the LCA and all concerned parties.
- 3507A-(6) In a direct communiqué from Gail Buhler, Union Coordinator I was informed absolutely that any communication with anyone other than her was prohibited and then only by telephone or fax. For a period of months I was unable to contact Ms. Buhler through her office. So I sought alternative means for remedy through John Sullivan, Vice President [of] Human Resources; Rick Rowe, Vice ... President [of] Clinical Support Services; Jill Bunch, Ultrasound Section Supervisor; Alonso Salinas, Union Steward; Leo Ward, Union Steward. Come to find out, Ms. Buhler had been dismissed and no one listed above bothered to inform me.
- 3507A-(7) On or about December 2007, Karina Morales, Ultrasound Student was hired by Jill Bunch, Ultrasound Section Supervisor for a position of which I had made many requests proving neither [the Antelope Valley Hospital District] nor [Respondent] fulfilled any employee agreement related to above.

REMEDY

Financial restitution for loss of monies, long-term detriment to personal character and professional reputation and other adverse impacts on my life.

Discussion

1. A Charging Party's Burden to Provide PERB with a Clear and Concise Statement of Facts and Conduct Alleged to Constitute an Unfair Practice

Charging Party was advised in a letter dated May 8, 2009 and in the October 29 Warning Letter that PERB Regulation 32615(a)(5)⁴ requires, among other things, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The November 21 amended charge does not provide a clear and concise statement of fact. Instead, the November 21 amended charge is comprised mostly of conclusions and citations to Government Code sections with little or no explanation why Charging Party believes the particular Government Code section was violated by Respondent. Consequently, Charging Party has failed to satisfy his burden of providing PERB with a clear and concise statement of facts and conduct alleged to constitute a violation of the MMBA. (PERB Regulation 32615(a)(5).)

2. The Duty of Fair Representation

The November 21 amended charge does allege that on April 27, 2008, Charging Party's grievance(s) was transferred to Local 2005 representative Gail Buhler and that Ms. Buhler denied him access to other Local 2005 stewards, failed and/or refused to return a number of his grievance status inquiries, and ultimately ceased her employment with Local 2005 without ever notifying Charging Party. As stated in the October 29 Warning Letter, while the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers* (1995) 35 Cal.App.4th 1213.) In *International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M, the Board determined that it is appropriate in duty of fair representation cases to apply precedent developed under the other acts administered by the Board.

⁴ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

In *American Federation of Teachers College Guild, Local 1521 (Saxton)* (1995) PERB Decision No. 1109, the Board held that an exclusive representative does not breach the duty of fair representation by failing/refusing to provide an employee with a union representative of his/her choice. Accordingly, Respondent's decision to assign Local 2005 representative Gail Buhler to Charging Party's grievance(s) and prohibit Charging Party from speaking with other Local 2005 stewards about his grievance(s) does not breach the duty of fair representation. (*Ibid*; *United Teachers of Los Angeles (Adams)* (2009) PERB Decision No. 2012.)

In *California Faculty Association (Wang)* (1988) PERB Decision No. 692-H, the Board held that an exclusive representative's failure to return all of a grievant's phone calls does not, by itself, breach the duty of fair representation. In *SEIU Local 1000 (Diunugala)* (2009) PERB Decision No. 2060-S, the Board held that a union's delay in responding to employees about grievance proceedings based on mere negligence or inadvertent omissions does not constitute a breach of the duty of fair representation. (See also *Service Employees International Union, Local 250 (Hessong)* (2004) PERB Decision No. 1693-M [union did not violate duty of fair representation despite taking more than two years to process a member's grievance].)

While Ms. Buhler's failure to respond to all of Charging Party's grievance status inquiries and Respondent's failure to notify Charging Party of Ms. Buhler's separation from Local 2005 is troubling, the facts alleged in the charge do not amount to more than mere negligence on the part of Respondent. Negligent conduct breaches the duty of fair representation only when it "completely extinguishes the employee's right to pursue his claim." (*Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H, quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270,1274.) Charging Party has failed to allege or provide a clear and concise statement of facts establishing that his grievance(s) was denied or even prejudiced because of Ms. Buhler's actions/inactions or because of any action/inaction by Respondent. Consequently, Charging Party has not established that Respondent's negligence completely extinguished his right to pursue his grievance(s) against his employer. Accordingly, Charging Party's allegation that Respondent breached its duty of fair representation to him is dismissed.

3. Remaining Allegations

As previously stated, Charging Party alleges that numerous MMBA sections were violated by Respondent but provides no facts, theories, or arguments in support of his allegations.⁵ Furthermore, Charging Party lacks standing to allege that Respondent violated sections of the MMBA applicable to the collective bargaining relationship between employee organizations and employers. (See generally *Oxnard Educators Association (Gorcey and Tripp)* (1988) PERB Decision No. 664.)

⁵ For example, Charging Party alleges that Respondent violated MMBA section 3501. MMBA section 3501 merely defines words used in the MMBA. MMBA section 3501 does not convey rights or prohibit conduct and thus MMBA section 3501 cannot be violated.

4. The MMBA's Six-Month Statute of Limitations

PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) In cases alleging a breach of the duty of fair representation, the six-month statutory limitations period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (*United Teachers of Los Angeles (Hopper)* (2001) PERB Decision No. 1441; *Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889.) Repeated union refusals to process a grievance over a recurring issue do not start the limitations period anew. (*California State Employees' Association (Calloway)* (1985) PERB Decision No. 497-H.)

In the October 29 Warning Letter, Charging Party was advised, among other things, that the above-titled charge was not filed within the MMBA's statute of limitations because on April 15, 2008 Charging Party advised Respondent that it had failed to represent him and as a result, he was going "to let higher authorities resolve this matter." Further, on April 15, 2008, Charging Party informed Respondent that he no longer had an expectation that Respondent was "listening." The October 29 Warning Letter concluded that these statements showed that Charging Party knew or should have known on or before April 15, 2009 that further assistance from Respondent was unlikely, and thus the above-titled charge was untimely because it was not filed within six months of April 15, 2008. Significantly, however, the October 29 Warning Letter did not consider the fact that Respondent continued to assist Charging Party with his grievance(s) after April 15, 2008. Accordingly, the above-titled charge is not being dismissed as untimely. Instead, it is being dismissed for the other reasons stated.

Right to Appeal

Pursuant to PERB Regulations, Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If Charging Party files a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Sean McKee
Regional Attorney

Attachment

cc: Bruce Harland, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

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October 29, 2009

Ronald Glen Johnson

Re: *Dennis Dale Hayes v. SEIU-United Healthcare Workers West Local 2005*
Unfair Practice Charge No. LA-CO-97-M
WARNING LETTER

Dear Mr. Johnson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 7, 2009,¹ and was amended on May 21, June 8, 17, July 6 and 8, 2009. Dennis Dale Hayes (Mr. Hayes or Charging Party) alleges that the SEIU-United Healthcare Workers West Local 2005 (Respondent) violated sections "3500-inclusive; 3500.5; 3501(A), (1), (2), (B), (C), (D), (E); 3504; 3504.5(A); 3505; 3507-(5), (6), [and] (7)" of the Meyers-Milias-Brown Act (MMBA or Act).²

Background as Alleged

The original charge provides in relevant part: "Due to the volume of evidence, I request a meeting for review with myself & my advocate—Ron Johnson." Attached to the charge is a copy of a National Labor Relations Board form titled, "NOTICE AND ACKNOWLEDGEMENT OF FILING OF CHARGE."

On May 7, 2009, I contacted Mr. Hayes³ via telephone and advised him that the above-titled charge had been assigned to me for processing. I also advised Mr. Hayes that the charge was not properly filed in accordance with PERB's Regulations.⁴ Specifically, PERB Regulation 32615(a)(5) requires, among other things, that an unfair practice charge include a "clear and

¹ On May 7, 2009, Mr. Hayes also filed an unfair practice charge against Service Employees International Union (LA-CO-96-M) and another against Antelope Valley Hospital District (LA-CE-534-M).

² The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB'S Regulations may be found at www.perb.ca.gov.

³ Mr. Hayes did not complete a notice of appearance form designating Mr. Johnson as his representative in this matter until May 21, 2009.

⁴ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

concise statement of the facts and conduct alleged to constitute an unfair practice.” In addition, PERB Regulations 32615(c) and 32140 require that a copy of an unfair practice charge be served on the respondent.

During our May 7 telephone conversation, I explained to Mr. Hayes that the above-referenced charge did not provide a clear and concise statement of conduct alleged to constitute an unfair practice or a completed proof of service form declaring that a copy of the above-titled charge was served on Respondent. I advised Mr. Hayes that his failure to correct the above-described deficiencies by May 18, 2009, could result in the above-titled charge being dismissed. On May 8, 2009, I sent Mr. Hayes a letter confirming our May 7 conversation. I also included instructions with my May 8 letter on how to file an unfair practice charge.

PERB received an amended charge from Mr. Hayes on May 21, 2009. The May 21 amended charge was accompanied by a deficient proof of service form (the name and address of the person served the unfair practice charge does not appear on the proof of service form). (PERB Regulation 32140.) Nevertheless, Respondent has not denied receiving a copy of the original charge or the May 21 amended charge. To the contrary, on June 5, 2009, Respondent filed a response to the above-referenced charge.

The May 21 amended charge consists of a letter dated February 4, 2008, an undated letter signed by Vladimir Dominguez concerning a meeting that took place in April 2008, several e-mail messages dated between March and April 2008, one e-mail message dated January 6, 2009, and a timeline titled, “Statement of Facts.” The “Statement of Facts provides verbatim:

- #1. On or about 8/22/2007, a collective bargaining agreement was signed by all parties authorized to make it a legal document.
- #2. From September 2007 to February 2008: I personally contacted every steward available to me with questions regarding scheduling, seniority, and bargaining unit language. Their names include Sue Vradenburg, Leo Ward, Vladimir Dominguez, Alonso Salinas, and Duane Roberts, among others.
- #3. 2/04/2008: Personally delivered the attached document (#1 of the evidence packet), to the Union and the hospital with proof of service.
- #4. 3/26/2008: All attempts failing, I wrote a letter to the Union (#2 of evidence packet) expressing my dismay over the utter lack of representation for which I had been paying.
- #5. 4/20/2008: This document (#3 of the evidence packet) proves the Union and the hospital acknowledged that there was a grievance. It further proves they chose to ignore the collective bargaining agreement and refused grievance procedures.

#6. 4/21/2008: This document (#4 of the evidence packet) is proof of collusion between UHW-West and AV Hospital authorities. Other evidence is available.

#7. 4/25/2008: This document was acquired by a demand from me alluding to charges in an attempt to justify his station. Mr. Dominguez must have sent this to himself. His error is evident.

#8. 4/26/2008: This (#6 of evidence packet) was evidence of Mr. Vladimir Dominguez' refusal to represent me in my grievance is proved by the date(s) cited this document sent to me as an attachment to an e-mail.

#9. 4/26/2008: (#7 in the evidence packet): In my attempts for recognition of my grievance I made everyone accountable, aware of the Union's failure to represent. The result was the denial of access to any person other than one Gail Buhler, and only by personal phone or fax.

#10. 1/07/2009: (#8 in evidence packet): To this date I have not been afforded representation by SEIU, UHW-West, AV Hospital, or NLRB.

Upon review of the documents attached to the May 21 amended charge, it appears that Mr. Hayes filed one grievance in "May of 2007" and another in March 2008. In the February 4, 2008 letter,⁵ Mr. Hayes expresses his frustration with how the Antelope Valley Hospital District and his "union" handled the May 2007 grievance. In the February 4, 2008 letter, Mr. Hayes also expresses his dissatisfaction with the assistance he was receiving from the "union." For example, Mr. Hayes wrote: "I finally put [the grievance] on hold expecting union assistance when I signed up. Not only can I not get any assistance from the union, I can't even get any information."

In an e-mail message dated April 15, 2008, Mr. Hayes informed Mr. Dominguez, several Service International Employee Union representatives, and several Antelope Valley Hospital District employees: "Everything you and Antelope Valley Hospital have done is bordering on ludicrous if not criminal. Left with no other satisfaction from either party, I've chosen to let higher authorities resolve this matter. No one to date has fulfilled their obligation to me, Antelope Valley Hospital, or the Union." Mr. Hayes' April 15 e-mail message continues in relevant part: "I've spent 10 months trying to get someone to hear me and [I] don't expect anyone's listening now."

⁵ Neither the charge nor the amended charges specify the recipient(s) of the letter.

In an e-mail message dated April 25, 2008, Mr. Dominguez informed Mr. Hayes:

On April 23, 2008 at 16:58 I received a letter from John Sullivan regarding our meeting on 4/22/08. Shortly after I received John's letter I contacted you. The time was about 17:32. You did not answer the phone so I left you a message regarding the letter. At 19:09 you called me back. I asked you if you wanted me to read the letter to you over the phone but you stated that you needed to see the letter before any conversation between us could take place. You asked me if I have a fax machine. I told you I did. You asked me to fax the letter to you . . . and you told me that you would get back to me later that day.

As of today, April 25, 2008, I have not received any communication from you telling me what to do next. I need to know if you want me to respond back to the Hospital or if you want me to pursue this matter further since the letter from John was addressed to me.

Dennis, I need your recommendation regarding the above mentioned issues. Quite honestly, I and some of the other Stewards have made suggestions to you and tried to answer your questions and give you advice. We have tried to help you, represent you, and understand your issues and concerns but it has been somewhat difficult trying to extrapolate data and information based on the limited and changing information we received from you. Regretfully, if I do not receive any response back from you regarding this important matter I will have to assume that you are satisfied with the remedies that the [Antelope Valley Hospital District] Management is imposing on you and I will be forced to close this case.

There are no facts contained in the charge or amended charges regarding whether Mr. Hayes ever responded to Mr. Dominguez's April 25 e-mail message. In an e-mail message dated April 27, 2008, Ms. Buhler informed Mr. Hayes: "I will be handling your case for the Union now. It is highly inappropriate to email all of the people on this list about your personal matter. You need to protect your privacy. Therefore, I am informing you that the Union will no longer be communicating with you through email. If you would like to discuss your case, please contact me at. . . ."

The e-mail message dated January 1, 2009, was sent from Mr. Ward to Ms. Buhler with a simultaneous copy of the e-mail message sent to Mr. Dominguez. The January 1 e-mail message provides in relevant part:

Dennis Hayes spoke to me last night inquiring about the status of a Grievance filed on his behalf several months back regarding Seniority/Job Vacancies as it pertains to night-shift weekends (his previous schedule which he wants reinstated). I confirmed with Alonso Salinas that Alonso Salinas did contact you regarding 3 past attempts by Mr. Hayes to contact you through Alonso. Mr. Hayes stated that he has not heard from you regarding this matter. I told Mr. Hayes that I would follow up with you on his behalf and provide you with contact numbers and include him (Cc) in this correspondence. Since I am not privy to the status of his Grievance or the progression of the steps I can only inquire.

The June 8 amended charge provides in its entirety: "The lack of substance in [Respondent's] response should cause no concern as our evidence includes more than one document."

The June 17 amended charge provides in relevant part: "It seems a hearing is forthcoming. I'd appreciate any correspondence from [Antelope Valley Hospital District attorney Dennis Regan] to your agency. The only communication I've had thus far from Mr. Regan is that he dialed my personal cell by mistake."

On July 6, 2009, PERB received a letter from Mr. Johnson re-requesting "correspondence between [PERB] and [Respondent]." On July 9, 2009, I contacted Mr. Johnson via telephone and informed him that PERB Regulation 32620, subdivision (c), requires that any written response filed by a respondent with PERB must be simultaneously served on the charging party. I also assured Mr. Johnson that the only response I had received from Respondent in this matter was the response it filed to the above-titled charge dated June 2, 2009. Mr. Johnson confirmed that he had received a copy of the response filed by Respondent dated June 2, 2009.

The July 8 amended charge is a letter addressed by Mr. Johnson to the General Counsel of the AFL-CIO. The July amended charge provides in relevant part:

Since 8/22/07 I've tried all avenues for any form of justice for something that amounts to nothing more than an infraction of protocol and/or policy of an agency governed by you. Collective bargaining agreement not excluded.

Charges from NLRB and PERB have been filed. I believe knowledge of this situation should be of concern to you.

An attorney for UHW-West, Gail Buhler ordered my brother to not communicate with your agency nor any other union or public agency. So, he did not. I can't believe your organization condones such an abuse of your Constitution and Bill of Rights.

My brother backed the union when there was nothing but the tailgate of a pick-up truck. My brother pays his dues each and every pay period. Why can't my brother get any representation?

As my brother's advocate, feel free to contact me anytime.

Discussion

1. PERB's Jurisdiction

PERB is a quasi-judicial administrative agency charged with administering California's collective bargaining statutes covering public employees. One of the statutes PERB administers is the MMBA, a comprehensive statutory scheme governing labor relations in California cities, counties, and special districts. (Gov. Code, §§ 3500, 3509.) However, the MMBA is limited in scope, regulating only certain conduct by employers and unions. (*Los Angeles Community College District* (1979) PERB Order No. Ad-64.⁶) For example, the MMBA does not specially address allegations of "collusion" between employee organizations and employers. Additionally, "PERB has no jurisdiction to remedy a violation of a collective bargaining agreement. . . ." (*City of Long Beach* (2008) PERB Decision No. 1977-M.)

2. A Charging Party's Burden and the MMBA's Six-Month Statute of Limitations

PERB Regulation 32615(a)(5) requires, among other things, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

⁶ When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

In cases alleging a breach of the duty of fair representation, the six-month statutory limitations period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (*United Teachers of Los Angeles (Hopper)* (2001) PERB Decision No. 1441; *Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889.) Repeated union refusals to process a grievance over a recurring issue do not start the limitations period anew. (*California State Employees' Association (Calloway)* (1985) PERB Decision No. 497-H.)

Based on the current record, Charging Party knew that further assistance from Respondent was unlikely on or before April 15, 2008, because that is when Charging Party advised Respondent that it had failed to represent him and as a result, he was going "to let higher authorities resolve this matter." Further, on April 15, 2008, Charging Party informed Respondent that he no longer had an expectation that Respondent was "listening." As previously stated, the MMBA's statute of limitations is six months. (*Coachella Valley, supra*, 35 Cal.4th 1072, 1092.) Therefore, to timely file the above-titled unfair practice charge alleging that Respondent violated the Act by failing to represent him, Charging Party needed to file the charge by no later than October 15, 2008. As previously stated, Charging Party did not file the present charge until May 7, 2009. Therefore, Charging Party has failed to provide a clear and concise statement of facts establishing that the above-titled charge was filed within the MMBA's six-month statute of limitations period. Nevertheless, even if the above-titled charge was timely filed, Charging Party has failed to establish that Respondent breached its duty to fairly represent him for the following reasons.

3. The Duty of Fair Representation

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers* (1995) 35 Cal.App.4th 1213.) In *Hussey*, the appellate court further held that the duty of fair representation is not breached by mere negligence and that a union is to be "accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union's power."

In *International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M, the Board determined that it is appropriate in duty of fair representation cases to apply precedent developed under the other acts administered by the Board. The Board noted that its decisions in such cases, including *Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332 and *American Federation of State, County and Municipal Employees, Local 2620 (Moore)* (1988) PERB Decision No. 683-S, are consistent with the approach of both *Hussey* and federal precedent (*Vaca v. Sipes* (1967) 386 U.S. 171).

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in *Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in

which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also, *Robesky v. Quantas Empire Airways Limited* (9th Cir. 1978) 573 F.2d 1082.)

Thus, in order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)*, *supra*, PERB Decision No. 1474-M.) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (*United Teachers – Los Angeles (Wylar)* (1993) PERB Decision No. 970.)

The current record is devoid of facts demonstrating that Respondent's representation of Charging Party was "without a rational basis or devoid of honest judgment." (*International Association of Machinists (Attard)*, *supra*, PERB Decision No. 1474-M.) To the contrary, the current record demonstrates that Respondent met and discussed Charging Party's grievance(s) with the Antelope Valley Hospital District. Further, on April 25, 2008, Mr. Dominguez contacted Charging Party regarding the status of one or more of Charging Party's grievances. There are no facts contained in the charge or amended charges demonstrating that Charging Party ever responded to Mr. Dominguez's April 25 e-mail message.

While Charging Party attached an e-mail dated January 6, 2009 to the above-titled charge, which contains facts regarding Ms. Buhler's failure to respond to some of Charging Party's grievance status inquiries, the Board has held that an exclusive representative's failure to return all of a grieving employee's phone calls does not, by itself, breach the duty of fair representation. (*California Faculty Association (Wang)* (1988) PERB Decision No. 692-H.) Further, Charging Party does not allege or demonstrate that Ms. Buhler failed and/or refused to respond to the January 6 e-mail message. Consequently, Charging Party has not established that Ms. Buhler stopped responding to all of Charging Party's grievance status inquiries or that Charging Party's grievance(s) was adversely affected by Ms. Buhler's failure/refusal to respond to Charging Party's grievance status inquiries. Accordingly, based on the current record, even if the above-titled charge was timely filed, Charging Party has failed to establish that Respondent breached its duty to fairly represent him.

4. Remaining Allegations

As previously stated, Charging Party alleged sections "3500-inclusive; 3500.5; 3501(A), (1), (2), (B), (C), (D), (E); 3504; 3504.5(A); 3505; 3507-(5), (6), [and] (7)" of the MMBA were violated by Respondent. However, Charging Party provides no facts, theories, or arguments regarding why he believes the above-cited sections of the MMBA were violated by Respondent. Many of the above-cited sections merely define words used in the MMBA and PERB's jurisdiction. Further, Charging Party does not have standing to allege that Respondent violated sections of the MMBA applicable to the collective bargaining relationship between

employee organizations and employers. (See generally *Oxnard Educators Association (Gorcey and Tripp)* (1988) PERB Decision No. 664.)

For these reasons the charge, as presently written, does not state a prima facie case.⁷ If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Sixth Amended Charge, contain all the facts and allegations Charging Party wishes to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before November 9, 2009,⁸ PERB will dismiss the above-titled charge. Questions concerning this matter should be directed to me at the above telephone number.

Sincerely,

Sean McKee
Regional Attorney

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⁷ In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

⁸ A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)